STATE OF MICHIGAN

COURT OF APPEALS

LYDIA L. BLANKS, Personal Representative of the Estate of RICHARD M. BLANKS, Deceased,

Plaintiff-Appellant,

v

CALDWELL CO., an Illinois corporation,

Defendant-Appellee.

UNPUBLISHED
June 25, 1999

No. 200271
Macomb Circuit Court
LC No. 92-003752 NP

Before: Smolenski, P.J., and Gribbs and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order reflecting a jury verdict concluding that defendant was not in any way negligent concerning an industrial accident that resulted in the death of plaintiff's decedent. We affirm.

Plaintiff's decedent died under the weight of a three-ton coil of steel in May 1991, while working at the General Motors Powertrain Plant in Warren, Michigan. These coils were moved by cranes, through use of C-hooks designed and manufactured by defendant. The C-hooks supplied to the Powertrain plant featured a lip on the lifting end of the C configuration to prevent coils from slipping off; according to the testimony, workers routinely nudged the coils short distances by lifting them with the lip itself, before setting them more securely in the C-hook in order to move them significant distances. There were no witnesses to the accident that killed the decedent, but several testified that a C-hook was found within a few feet of decedent's body at the accident site.

Plaintiff's theory of the case was that the steel coil that killed the decedent fell from its C-hook while suspended only by the hook's lip, and that defendant was negligent for its failure to place any kind of warning on the C-hook concerning unsafe usage or otherwise guard sufficiently against possible human error. Defendant argued that defendant had provided adequate warning, that whether the C-hook had a warning decal at the time of the accident was "not important because General Motors and its employees were sophisticated in the use of these C-hooks and steel coils," and that the danger attendant to suspending a coil on the lip of the C-hook "would be very obvious to anyone . . . , let alone an operator."

The jury specifically found that defendant was not negligent in its design of the C-hook, that General Motors was sophisticated in the use of the C-hook, and that defendant was not negligent in failing to warn of the hazards associated with use of the C-hook.

On appeal, plaintiff alleges instructional error, improper modification of the verdict form, and improper admission of evidence of a subsequent remedial measure. We find no basis for affording plaintiff appellate relief.

I Subsequent Remedial Measure

At trial, defendant's chief engineer testified regarding the use of warning decals with C-hooks. This witness was asked to compare a photograph of a warning decal featuring a pictorial image of a load striking a person with a photograph of the C-hook at issue. The witness stated that the pictured decal contained the same cautionary language as the decal supplied with the C-hook. Plaintiff objected on the ground that "it does not appear that that is the same decal." The trial court stated that "the objection goes to the weight of the value of the evidence," and allowed defendant to proceed. Under plaintiff's voir dire, the witness clarified that "what you're seeing is an earlier version. This is an older photograph. This is a newer version of that same decal." When asked on cross-examination whether the pictured decal represented the actual decal allegedly placed on the C-hook in question, the witness answered, apparently referring to the decal that supposedly had accompanied the C-hook, "Must be an earlier version."

The trial court excused the jury, and plaintiff renewed the objection within the context of an unsuccessful motion for discovery sanctions, on this occasion characterizing the picture in question as evidence of a subsequent remedial measure. When cross-examination of that witness resumed the following day, plaintiff elicited that the decal pictured came into use after the accident at issue.

Plaintiff asserts on appeal that the trial court abused its discretion in admitting the photograph of the newer decal, arguing that this was improper admission of evidence of a subsequent remedial measure. This argument is without merit.

MRE 407 states as follows:

> When after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Plaintiff states that it is "axiomatic" that this rule " is equally applicable to Plaintiff and Defendant during trial," while citing no authority for this supposedly obvious legal proposition. We agree with the trial court that to the extent that defendant's exhibit constituted evidence of a subsequent remedial measure, defendant, not plaintiff, stood to suffer any resulting prejudice.

We reject plaintiff's argument that defendant "sought to buttress its defense by admitting evidence of subsequent remedial measures and contenting [sic] to the jury that they were not subsequent in nature but that the pic-to-gram warnings were in fact on the C-hook when it was sold to General Motors," and plaintiff's further characterization of the incident as "tantamount to fraud and deliberate misrepresentation . . . ." As an initial matter, this argument impliedly raises questions of relevance or possible confusion, not subsequent remedial measures as evidence of negligence, the latter being the sole basis for the challenge on appeal. Beyond that, because plaintiff well elicited from the witness that the decal in the exhibit differed from any alleged to have been included with the C-hook in question, there is no reason to fear that the jury could have concluded that the admittedly subsequent remedial measure was in fact in place at the time of the accident. Indeed, in closing arguments, plaintiff admonished the jury that it was "uncontradicted" that the hook at issue included no labels concerning safe usage, and also exhorted the jury to examine a police photograph of the accident scene that showed the absence of a warning decal.

Because the jury could hardly have failed to understand the subsequent nature of decal in the contested exhibit, and because to the extent that that understanding implied that defendant effected remediation of a previously deficient warning that understanding favored plaintiff, not defendant, we conclude that this issue presents no basis upon which to grant plaintiff appellate relief.

II Sophisticated User

Plaintiff contends that the trial court erred in deciding to modify the instructions and verdict form after plaintiff's closing argument, arguing that plaintiff was prejudiced from having presented its closing statement with a misunderstanding concerning the final form of these materials. There is no merit in this argument.

Following the presentation of evidence and before closing arguments, the trial court and the parties reviewed proposed jury instructions and the special verdict form. Plaintiff objected to an instruction to the effect that if the jury found that General Motors was a sophisticated user of the equipment at issue then the jury must find for defendant. The trial court agreed, stating that the jury would decide under standard instructions, in light of "the particular specific circumstances of the this case, given the nature of the user, the nature of the company making the design, the particular design of the hook, [and the] prevalence of its use in the industry," whether "[d]efendant in this case was reasonably prudent in its design of the product . . . ." However, the court determined that it would include on the special verdict form the question whether General Motors was sophisticated in the use of the C-hook. There was no objection to this at that time.

Only after plaintiff's closing argument did plaintiff contest the special verdict form in relation to the sophisticated-user inquiry. The trial court stated, "I addressed certain objections and no other objections were voiced. If there is an objection I can deal with that right now." After entertaining arguments, the court stated that the sophisticated-user inquiry would be useful to "give the Court the option following the trial to consider this whole issue of the sophisticated defense," but that the verdict form would be changed to allow the jury to address the questions of defendant's negligence and proximate causation even if the jury found General Motors to be a sophisticated user. The court stated

that the jury's finding in this regard would be "something of an advisory question . . . because it may or may not be binding on the Court . . . ."

When proceedings resumed the following day, the court stated as follows:

> Generally speaking, it is inappropriate for the Court to revise instructions, and I would think that would extend in most instances to the verdict form itself after argument is commenced, and I recognize that the Court itself has an independent responsibility to make sure the jury is properly instructed and the verdict form is appropriate, so even though I believe Counsel had actually agreed to the form as it existed, apart from those objections the Court addressed before the argument commenced, I think I have to look at the verdict form still in a manner to be sure that the jury is given appropriate choices and is instructed appropriately.
>
> My problem with the questions asked under part Two of the Special Jury Verdict Form, one of my problems is that the question 2-A ask the jury to answer whether General Motors was sophisticated in the use of the C-Hooks, and yet the instructions themselves don't given them any direction for determining whether they are sophisticated in the use of C-Hooks or not. The cases that discuss what Counsel has referred to as a sophisticated user, defense talks in terms of entities that are experts or professionals by virtue of their training, education and experience in the use of products of this type. In fact, none of the authorities I looked to have really used the term sophisticated user. I am not sure if that is dealt with in other literature that I have read or not, but the question in the verdict form is standing with no real direction to the jurors at giving them assistance at answering it. I am looking to see whether any of the proposed specials that the Defendant submitted go to that question.
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> The other argument made by [plaintiff's counsel] is that, first of all he didn't feel the question was properly framed in the warning section of the verdict form, and that if it is included in the verdict form it should not preclude the jurors from answering questions . . . relating to negligence and proximate cause. . . .

Neither party proposed an instruction defining "sophisticated user." Therefore, the court presented an advisory instruction and neither party objected to the instruction.

When proceedings resumed, defendant gave closing arguments. The is no indication in the record that plaintiff wished to add anything to plaintiff's closing argument—in response to the changes in instructions and verdict form or for any other reason. We conclude from this record that plaintiff was neither forced to present closing argument without a full understanding of how the jury would be instructed, nor otherwise prejudiced by the court's decision to modify the instructions and jury form while closing statements were in progress.

III Supplemental Instruction

The trial court provided the following general instructions on negligence:

> When I use the word negligence I mean the failure to do something that a reasonably careful person or company would do or the doing of something which a reasonably careful person or company would not do under the circumstances which you find to exist in this case. It is for you to decide what a reasonable, careful person or company would do or would not do under the circumstances.
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> * * *
>
> The Defendant had a duty to use reasonable care at the time it designed the C-Hook so as to eliminate reasonable risk of harm or injury which were reasonably foreseeable. . . .
>
> However, the Defendant had no duty to design a product to eliminate risk of harm or injury or risk that were not reasonably foreseeable. Reasonable care means that degree of care which a reasonably prudent manufacturer would exercise under the circumstances which you find existed in the case. It is for you to decide, based upon the evidence, what a reasonably prudent manufacturer would do or would not do under those circumstances. A failure to fulfill the duty to use reasonable care is negligence.

Plaintiff argues on appeal that this instruction was inadequate to cover the issue of defendant's duty to provide adequate warning of possible dangers of using the C-hook, setting forth in the brief on appeal two paragraphs of special instruction in this regard that plaintiff allegedly requested. However, nowhere in plaintiff's brief does plaintiff indicate where in the record below this instruction was requested. MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the record. Page references to the record must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means.") Because plaintiff has failed to demonstrate that this issue was preserved, we decline to review it here. See *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 269; 548 NW2d 698 (finding an appeal vexatious for reasons including failure to provided citations to the record); *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997) (a party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim); *Providence Hospital v National Labor Union Health & Welfare Fund*, 162 Mich App 191, 194; 412 NW2d 690 (1987) (this Court generally will not review issues that were not raised before, and decided by, the trial court).

Further, we conclude that the instructions actually given were adequate in that they fairly presented the theories of the parties and the applicable law. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). Plaintiff maintained throughout the trial that defendant breached a duty to warn, and the jury was specifically asked to pass on whether defendant breached any such duty. Because this subject matter is well covered by the instruction that defendant "had a duty to use reasonable care at the time it designed the C-Hook so as to eliminate reasonable risk of harm or injury which were reasonably foreseeable," we conclude that the trial court properly instructed the jury.

Affirmed.

/s/ Michael R. Smolenski
/s/ Roman S. Gribbs
/s/ Peter D. O'Connell